STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,673

)

Appeal of)

)

INTRODUCTION

The petitioner, a nursing home resident, appeals a determination by the Department of Social Welfare finding that he is ineligible for Medicaid due to excess resources. His wife, who lives in the community, joins in the appeal asking that the Board revise the community spouse resource allowance to her because it is inadequate and deduct it from her husband's resources which will then make him eligible for Medicaid benefits. The petitioners also request that, in the event that the husband is found Medicaid eligible, the minimum monthly maintenance allowance for the community spouse be increased and that the institutionalized spouse's income be allocated to the community spouse to increase her monthly income.

FINDINGS OF FACT

The facts in this matter all came in through a stipulation on the record. The pertinent facts are as follows:

1. Mr. and Mrs. H. are an elderly husband and wife who resided in a suburb of Boston for most of their married lives. In March of 1993, Mr. H., who was diagnosed with Alzheimer's disease, was placed in a nursing home in southern Vermont by Mrs. H. He was placed in that home because it was the only one Mrs. H. felt she could afford which would give her husband good care. For about a year, Mrs. H. paid privately for the nursing home and visited her husband on a weekly basis, a two hundred mile round trip from her home.

2. Mr. H. has income from Social Security of $767.00 per month and $74.00 per month from an annuity. Mrs. H. has Social Security of $357.00 per month, a retirement pension of $146.62 per month and a VA benefit of $61.00 per month which she receives based on the death of her first husband. In addition, in 1993, Mrs. H. had interest and dividend income from IRAs, stocks and mutual funds she owns of about $787.00 per month.

3. Mrs. H. had been paying for the nursing home by cashing in various IRAs and some stocks, more than

$16,000.00 worth according to her 1993 tax return. After about a year, Mrs. H. became concerned that she would have to cash in more and more of her stocks to pay for her husband's care. This concerned her financially because she lives in large part off of the dividends from those stocks. In addition, she does not get much when she sells the stocks because she inherited them (many years ago from her father) and must pay a high capital gains tax as she has no basis of investment in them.

4. On February 14, 1994, Mr. H. applied for Medicaid. At that time Mr. and Mrs. H. reported the above income to the Department and resources consisting of a home and a burial account of $2,500.00 in Mr. H's name. Mrs. H. also reported that she personally owned $13,144.00 in a Savings Account, $17,827.00 in an IRA and stocks and mutual funds amounting to $143,363.00

5. On February 23, 1994, the Department notified Mr. and Mrs. H. that the Medicaid application had been denied because Mr. H.'s resources were "$97,174.00 more than the Department standards allow for a household of your size, $2,000.00". They were also advised that they might be eligible if the excess were used on certain medical expenses and warned that transferring resources to qualify for Medicaid could make them ineligible. They were advised to contact the office if they needed more information and told that they had a right to appeal. They filed an appeal on March 2, 1993 along with a letter requesting an exception and an income and expense sheet.

6. Although the notice did not so state, the Department represented that the petitioner's resource eligibility was calculated by deducting a $72,660.00 standard community spouse resource allowance from the couple's combined countable resources of $171,834.00. The Department did not notify the petitioner that she had a right to seek a different community spouse resource allowance from the Human Services Board if she felt she needed more money to live on. A review filed by the Commissioner dated March 15, 1994, indicated that Mrs. H.'s letter and expense sheet had been reviewed "but the Department cannot find your wife to be in a hardship at this time." The petitioner was not advised by the Department that she had a right to ask for a revised determination of her spousal allocation from the Board if she relied on the resources for her income.

7. Mr. H.'s income has not changed since he filed his application, and remains at $841.00 per month. Mrs. H.'s income fluctuates based on the vagaries of the stock market. In June of 1994, she had the same Social Security, VA and pension benefits but her stock dividend payments were down to $613.00 per month, resulting in a total monthly income of $1,177.62. The total value of her resources was also down to $146,700.00 due to a decline in the stock market and expenses associated with the nursing home care.

8. Mrs. H. submitted credible documentation that her monthly expenses are $2,153.84. The details of those expenses are included in Exhibit One which is attached hereto and incorporated herein by reference. Included in those monthly expenses are taxes of $358.99 and house insurance premiums of $41.50.

ORDER

The decision of the Department denying Medicaid to the institutionalized spouse is reversed. The community spouse's request to revise her resource allowance to the full amount of resources possessed

by her at the time of application, to wit, $171,834.00 is granted. The community spouse's request to revise her minimum monthly maintenance needs allowance is allowed to the extent of a $162.00 per month increase over the $1,535.00 minimum allowed by the regulations for a total of $1,697.00 per month.

REASONS

This is a case of first impression before the Board in that the institutionalized spouse's eligibility for Medicaid hinges upon a finding by the Board that the standardized resource amount allowed to the community spouse (and thus not counted as a resource of the institutionalized spouse) is inadequate and should be increased. Under the Medicaid regulations, the resources of both spouses must be lumped together regardless of which spouse actually owns them in order to determine eligibility for long term care. However, a spouse in the community is automatically entitled to have a portion, currently set at $72,660.00, allocated for his or her support and care and not counted in the joint property amount. After eligibility is determined, the Medicaid scheme also allows the institutionalized spouse to pay over amounts of his or her income to the community spouse if it is needed to reach a certain monthly maintenance minimum. If the spouses feel that the resource or monthly income allocation is inadequate, the federal statute sets up a unique process which requires that the fair hearing Board, and not the Department, makes the initial finding as to whether the spousal allocation should be revised and also whether the monthly maintenance amount should be increased. The federal authorizing statute provides as follows:

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of----

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B) of this section);

(iii) the computation of the spousal share of resources under subsection (c)(1) of this section;

(iv) the attribution of resources under subsection (c)(2) of this section; or

(v) the determination of the community spouse

resource allowance (as defined in subsection (f)(2) of this section);

such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A) of this section, an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(e)

The Department of Social Welfare has not promulgated regulations pursuant to this statute, which was originally enacted as part of the Medicare Catastrophic Coverage Act of 1988 and last revised in 1993. The regulations promulgated by the Department specifically discuss the right of an applicant and his community spouse to request a fair hearing where the monthly maintenance amount is at issue (See M413.21), but are not so explicit with regard to the resource allocation, although even the resource regulations refer to the use of "an amount set by fair hearing." (See M270.2(2)) In any event, the Department does not now appear to reject the notion (as they did at the original hearing)that the Board is required to revise both those standards under certain circumstances pursuant to the above statute.[(1)]

The first issue squarely before the Board is whether and in what amount the community spouse's resource allocation should be increased. Paragraph (e)(2)(C) of the statute cited above makes it clear that a new amount must be substituted if either spouse establishes that the income generated by the standard spousal allowance is not adequate when added to any other income to raise the community spouse's total monthly income to the minimum monthly needs allowance.

Under the federal statute, the minimum monthly needs allowance is defined and established as follows: [(2)]

(d) Protecting income for community spouse

. . .

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5))[(3)] the "community spouse monthly income allowance" for a community spouse is an amount by which--

(A) except as provided in subsection (e) of this section, the minimum monthly maintenance needs

allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance.)

(3) Establishment of minimum monthly maintenance needs

allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with sections 9847 and 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the

"applicable percent" described in this paragraph, effective as of --

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500.00 (subject to adjustment under subsections (e) and (g) of this section).[(4)]

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter "allowance" means, for a community spouse, the amount by which the sum of--

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 2014(e) of Title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

. . .

42 U.S.C. § 1396r-5

This rather lengthy section can be summarized as requiring a case by case determination in which a standardized figure based on poverty indexes is added to an individualized figure based on the community spouse's actual shelter expenses to obtain a figure which is then reduced by the monthly amounts already coming into the household. The Department's regulations, inexplicably, use a slightly different methodology:

Allocation to Community Spouse

A Standard Community Spouse Allocation (see Procedures Manual) may be deducted from a long-term care spouse's income for the needs of a spouse who is living in the community. In no case shall an allocation be made to a community spouse whose countable resources exceed the Community Spouse Resource Allocation Maximum (see Procedures Manual) or a higher amount set by a Fair Hearing or court order in accordance with policy in the Special Requirements for Applicants/Recipients Living in Long-Term Care section. This standard deduction is reduced by the gross income, if any, of the community spouse. The long-term care spouse is not required to make the full (or any) allocation to his/her spouse.

. . .

A higher amount, up to the Maximum Community Spouse Allocation as specified in Title XIX of the Social Security Act, as amended (unless a higher amount has been set by a Fair Hearing or court order), may be deducted for the needs of a community spouse upon documentation of a greater need. The higher amount is determined by adding a Maintenance Income Standard to any Excess Shelter Allowance (see Procedures). The Excess Shelter Allowance is equal to the amount by which actual shelter expenses exceed the Shelter Standard; the Shelter Standard is equal to 30 percent of the Maintenance Income Standard (which is equal to 150 percent of the federal Poverty Guideline for two). The community spouse, as well as the applicant/recipient, has a right to request a Fair Hearing.

This amount (i.e. the maintenance income standard plus the excess shelter allowance) is reduced by the gross income, if any, of the community spouse.

. . .

M413.21

No explanation was offered by the Department as to where it derives the authority to use its method number one, which is a standardized amount ($1,200.00, see Procedures Manual 2420 D8) since the statute requires that method number two be used in all cases. If the Department's regulation is to make any sense, it would mean interpreting the term "greater need" to mean anyone who would get a higher monthly maintenance figure if method number two were used. In that case, the $1,200.00 standardized figure would merely be a bonus to those who have no excess shelter expenses to add.

It must be concluded, therefore, that method number two, the "greater need" standard must be used in this case. Under that standard the community spouse's monthly maintenance need would be calculated as follows:

(1) 150% of the official poverty line for two ($9,432.00) divided by twelve obtains a monthly figure of $1,179.00 (see Procedures Manual 2420 D8).

(2) The excess shelter allowance is calculated by adding the community spouse's monthly shelter expense of $400.49 ($358.99 for taxes and $41.50 for insurance) to the Department's standard monthly utility allowance of $311.00. That total of $711.49 is compared to thirty percent of the amount described in Step One which is $354.00. The difference between the two, $356.00, is the excess shelter allowance.

(3) $1,179.00 from step one and $356.00 from step two are added together for a minimum monthly maintenance needs allowance of $1,535.00.

Having established that the petitioner's monthly maintenance minimum should be $1,535.00 (and withholding judgment for the moment on whether that should be increased), the question next arises whether the petitioner has income adequate to meet that amount if she no longer has her resources. In this case, the answer is clearly no. The petitioner, without the income from her resources, has only $564.62 in income.[(5)] If the petitioner is allowed to protect all of the resources currently owned by her, she will earn an additional $613.00 per month in income. That amount, when added to the $564.62 she receives in benefits, leaves her with $1,177.00 in monthly income, still considerably below her $1,535.00 per month allowed need. Since she needs all her current resources amounting to some $144,000.00 to even provide a portion of what she is allowed to retain, it must be concluded that the community spouse has established that she needs a larger allocation equalling the total amount of assets, $144,000.00, now possessed by her.[(6)] Therefore, the Board, under the statute, is compelled to allocate that amount to her.

If the community spouse needs all the extant resources to provide for her monthly needs, then the institutionalized spouse cannot have them attributed to him. Therefore, the institutionalized spouse is not ineligible based on excess resources. The parties have agreed in this matter that the petitioner's only impediment to eligibility is the resource excess, and if the petitioner is found eligible for Medicaid, the Board could immediately consider whether the community spouse must be allowed an additional

amount under the monthly minimum maintenance allowance. This is because under the regulations, only the Board, and not the Department, can grant a waiver of the maximum amount. Therefore, if these cases were not now consolidated, the petitioner would have to immediately re-petition the Board for another hearing.

The regulations at M413.21, cited above, allows the institutionalized spouse to deduct an amount from his income which may be needed by the community spouse to meet the Standard Community Spouse Allocation, so long as the community spouse does not possess resources in excess of amounts set by the regulations or through the fair hearing process. As discussed above, the community spouse allocation in this matter is set by regulation at $1,535.00 per month. (If the petitioner had higher shelter expenses, the Department could have set an amount up to $1,816.50 per month.) She is eligible for consideration for an increase because her resources are not presently above those set by this fair hearing. She argues that an increase is necessary because she has ordinary and necessary expenses which are not met by her allocation. However, the federal regulations cited above at 42 § 1396r-5(e)(2)(B) require that any income increase above the regulatory limit be restricted to a showing that the need is "due to exceptional circumstances resulting in significant financial duress". Therefore, the petitioner's allotment can only be increased through a showing that her expenses are based on needs which are out of the ordinary.

Although the community spouse's expenses exceed the monthly allotment, it cannot be found, for the most part, that they are unusual. She has the same kinds of expenses with which most persons are burdened and has budgeted in a good deal of discretionary spending on gifts, cable TV, home furnishings and pet food as well. While no one would argue that the community spouse's expenditures are frivolous or unreasonable, and are no doubt essential to her lifestyle, they are not, for the most part, the result of any exceptional circumstances which might justify an increase in the monthly allotment. The allotments presumably take into consideration these usual expenses, although there is no doubt that they expect expenses to be met in a very modest way or eliminated as not essential to survival.

There is one notable exception, however, in the community spouse's monthly expenditures which does appear to be due to exceptional circumstances, and that is the expense the community spouse incurs to visit her institutionalized spouse. Her husband, due to financial and medical reasons over which she has no control, now lives over one hundred miles away from their long-time home. Because the community spouse needs to visit him on a weekly basis, she incurs car related expenses of $165.00 per month. The need to travel to visit her spouse is the kind of extraordinary expense which is not contemplated in the standards. The petitioner's need to incur this expense (as opposed to other spending which she could reduce or eliminate if she had no funds) would result in a financial hardship to her because the money would have to come out of the allowance she gets to pay for her regular monthly maintenance items. For those reasons, the Board finds that the petitioner's monthly maintenance allowance needs to be increased by the amount she must spend to maintain her car ($165.00) so that she can continue to both support herself in the community and visit her husband on a weekly basis. The total revised monthly maintenance allowance is $1,700.00, which would allow the institutionalized spouse, if he chooses, to contribute from his income up to $522.38 per month (the difference between her income and minimum monthly allotment) for the upkeep of the community spouse.

A final word to the Department on the notice issue is in order. The Department is clearly required by the above regulations (and due process) to notify applicants for Medicaid of their right to request a higher community spouse allowance and/or minimum monthly maintenance amount. This petitioner would not have known of that right had he not consulted a lawyer. This situation needs to be remedied at once. The Board suggests that the Department adopt the following language in its decisional notices for long-term

Medicaid eligibility:

An applicant or spouse of an applicant for payment of long-term care under the Medicaid program who is dissatisfied with a determination by the Department of Social Welfare as to:

(1) the maximum amount of the couple's resources which the spouse staying in the community can keep for his or her personal support;

(2) the maximum amount of the couple's income which the spouse staying in the community can keep for his or her personal support; or

(3) the amount of income or resources actually received by either spouse, has right to seek revision of those figures through a fair hearing before the Human Services Board. Requests for hearings can be made in person or in writing through the District Welfare office within 90 days of the date of the decision.

# # #

1. The Department does contend that the petitioners are required to choose only one of these standards for revision due to the use of the word "or" after paragraph (2)(a)(iv) supra. However, that argument is entirely unpersuasive as the clear language of the statute indicates that the purpose of the section is to list and not to restrict the grounds for appeal. Language in the Department's own regulation at M413.21--prohibiting monthly maintenance allocations and revisions "to a community spouse whose countable resources exceed the Community Spouse Resource Allocation Maximum

. . . or a higher amount set by a fair hearing. . ."--indicates that a spouse who has already had a resource revision and does not have resources in excess of the revised amount, can apply for an income maintenance revision as well through the fair hearing process.

2. An analysis of this methodology, though tedious, is unfortunately necessary as the Department has failed to establish this amount in this case.

3. Paragraph 5 requires that monthly maintenance amounts cannot be any less than a Court ordered amount if such a support order exists.

4. Subsection (e) refers to revision of the amount through the fair hearing process. Subsection (g) requires that amounts to be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers for the calendar year involved. According to the Department's procedures manual that figure is now set at a maximum of $1,815.50.

5. After the institutionalized spouse is found eligible he may elect to give the petitioner an amount needed to meet her monthly maintenance requirement if she cannot meet it on her own. However, that step cannot be taken before eligibility is determined and his income cannot be found to be available to meet her needs at this point since his being found eligible will cause an assignment of his income (with certain deductions) to the Department.

6. It is not necessary to actually determine how much she could retain in the future to meet her monthly

allowance since her resources will not be counted at all after the month in which her husband is determined Medicaid eligible.